No. 86-1659

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL CAN COMPANY,
Petitioner,

v.

ROBERT GAVALIK, *et al.*,
Respondents,

-and-

CONTINENTAL CAN COMPANY, a member of THE CONTINENTAL GROUP, INC.,
Petitioner,

v.

ALBERT JAKUB, *et al.*, on behalf of themselves and others similarly situated,
Respondents.

SUPPLEMENTAL BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF OF THE UNITED STATES

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I. Exhaustion of Grievance-Arbitration Remedies.

The Solicitor General admits that there is a clear "express" conflict among the circuits, that the exhaustion issue is "certain to arise again" and is "of considerable importance to the millions of employees covered by pension plans" (*See* Br. at 12) and that the Court "will most likely have to consider at some time whether exhaustion is required before suit is filed under Section 510 ... ." (Br. at 13).

The Solicitor General's opposition on the exhaustion issue is entirely premised on the argument that this Court could not decide the arbitrability issue and relies exclusively on *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972). Such reliance is misplaced. Unlike that case, the arbitrability issue here has been squarely presented to the Court and this pension-related dispute is covered by the terms of the applicable Pension and Master Agreements.

In *Iowa Beef Packers*, the Court concluded that the issues presented by petitioner "provide no occasion to address" the exhaustion question. 405 U.S. at 230 (1972). The Court therefore dismissed the petition as improvidently granted. The exhaustion issue in the present case as stated by the petitioners is whether an employer is prevented "from enforcing a provision in a collective bargaining agreement to arbitrate *any pension-related differences.*" (emphasis added, pet. at i). The issue is clearly presented and *Iowa Beef Packers* is inapposite.

Moreover, petitioners have also clearly called for review of the lower courts' decisions that the underlying dispute is non-arbitrable under the Pension Agreement and the Master Agreement. Petitioners noted that the decisions are in conflict with this Court's long-standing presumption in

favor of the arbitrability of labor disputes. Petition at 9, n.5.

The Solicitor General has confused *Iowa Beef Packers* with the first prong of the test for arbitrability enunciated in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). In *Iowa Beef Packers*, the issue as presented was whether exhaustion was required of a non-arbitrable dispute. The Court could not reach the exhaustion question because there was no arbitration procedure available to exhaust. In *Mitsubishi Motors*:

> [T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.

Id. at 626.

Petitioners have asked this Court to enforce provisions in its collectively-bargained Pension Agreement and in its collectively-bargained Master Agreement to arbitrate *any pension-related differences*. As in *Mitsubishi*, the Court will have to decide whether the parties agreed to arbitrate this dispute. Unlike *Iowa Beef Packers*, the petition here squarely presents the question of whether exhaustion is required and an arbitration procedure is available for that purpose.

Petitioners contend that the grievance dispute and the statutory dispute are one and the same, that the parties agreed to arbitrate and that the arbitrator is empowered to decide the dispute. *See* petitioners' reply brief at 2, n.2. The unambiguous meaning of the grievance/arbitration clauses requires exhaustion.*See* the petition at 105a for the definition of a grievance in the Master Agreement. From the Pension Agreement at pet. 120a:

> *Any differences* that may arise between you and the company concerning . . . your entitlement to . . . (a) pension . . . may be taken up as a griev-

> ance in accordance with the applicable provisions of the Master Agreement. (emphasis added.)

Compare and contrast this "any differences" language and the terms cited by the Solicitor General at 10, 11, and n.11.

The Solicitor General admits at 13, n.15, that the Eleventh Circuit decided that exhaustion was required in a nearly identical case in which employees sued both the petitioners and the United Steelworkers Union. *Mason v. Continental Group, Inc.*, 569 F. Supp. 1241, *aff'd*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986). The dispute was held arbitrable under the terms of the same arbitration provisions at issue here. This Court denied certiorari.

The Solicitor General then makes the following unfounded, unwarranted and erroneous statement. "The court appeared to be unaware, however, that relief was unavailable under the terms of the relevant agreements." (Br. at 13, n.15). What does the Solicitor General think the district court, the Eleventh Circuit and this Court decided in *Mason* when the issue of exhaustion was considered in the context of these same agreements?

The Solicitor General's following statement exemplifies the prejudicial view expressed in his brief.

> Even if it is assumed that the court implicitly decided that there was some procedure to exhaust, it would not be sensible to grant the petition for a writ of certiorari here to resolve a conflict over the interpretation of Continental Can's pension and collective bargaining agreements. That is especially so since the Mason litigation has concluded, so that it is not possible to provide relief to the employees who brought that suit.

Id.

It is still possible to provide relief to the petitioners in a manner which would resolve the conflict among the Circuits and with *Mason*, namely, require exhaustion.

If the arbitration provision is ambiguous, the issue needs to be briefed and argued. The intent of the arbitration provisions, the past practice of the parties and the practice and interpretation throughout the industry support exhaustion.

Further, the Solicitor General, erred by relying on *Zipf v. American Tel. & Tel.*, 799 F.2d 889 (3d Cir. 1986), and by failing to distinguish between exhausting plan procedures in a non-collectively bargained plan and failing to exhaust the arbitration provisions in a collectively bargained Pension Agreement.

Monica Zipf was a managerial employee. Appellant's Brief at 5, Appellee's Brief at 6 in *Zipf, supra*, No. 85-3420. There is no mention in the *Zipf* decision of a union or of a collective bargaining agreement. The policy reasons behind the distinction between a non-union plan and a collectively bargained Pension Agreement are important. As Senator Hartke stated in Senate debate:

> The procedures with respect to union employees would be handled by arbitration.

Legislative History of ERISA of 1974; Vol. 2, at 1837; 119 Cong. Rec. 30,401 (1973).

The extraordinary layoff pension benefits at issue here were created in collective bargaining, not under ERISA, and as such are part and parcel of the collective bargaining process. If this decision on arbitrability stands, the anomalous result will ensue that the union created rights in collective bargaining yet created no corresponding method to enforce those rights. Implicity, the union would have breached its duty of fair representation.

The Solicitor General is clearly and simply wrong on *Iowa Beef Packers*. The arbitrability issue is before the

Court. The Solicitor General could not have answered the first prong of the test for arbitrability enunciated in *Mitsubishi* because the issue has not yet been briefed.

The Solicitor General also chose to ignore this Court's reliance on H.R. Conf. Rep. No. 93-1280, p.327 (1974) from ERISA's Legislative History. ERISA civil actions are to be regarded as arising "in similar fashion to those brought under § 301 of the Labor Management Relations Act of 1947." *Metropolitan Life v. Taylor*, 107 S.Ct 1542 (1987). Section 301 is of course this Court's authority for its long-standing presumption in favor of arbitrability in labor cases. Exhaustion is required.

II. The Statute Of Limitations.

The Solictor General utterly failed to address two important legal principles:

A.) This Court has repeatedly taught that ERISA should be uniformly applied. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), *Pilot Life v. Dedeaux*, 107 S.Ct. 1549 (1987), *Metropolitan Life v. Taylor*, and *Fort Halifax Packaging Co. v. Coyne*, 107 S.Ct. 2211 (1987).

B.) ERISA preempts state laws. 29 U.S.C. § 1144(a).

The Solicitor General ignored the various state periods of limitations ranging from two to six years applied by lower courts to date. *See* petition at 17, n. 11. The Solicitor General ignored this Court's teaching in *Agency Holding Co. v. Malley-Duff and Assocs.*, 107 S.Ct. 2759 (1987), and *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617 (1987), which respectively opted for a uniform federal limitations period and rejected the same Pennsylvania state catch-all period at issue here. The federal policies at stake require a uniform federal statute of limitations.

At 14, the Solicitor General asserts: "Congress generally may be presumed to have intended a state rather than federal period to apply, given its awareness of this Court's longstanding practice of borrowing state periods." This

argument is refuted by Congress' preemption of state pension laws. 29 U.S.C. § 1144(a). It is simply illogical to suggest that this Court should presume that Congress intended a state limitations period to apply when Congress expressly preempted state laws.

The Legislative History reveals that the Solicitor General's presumption is unwarranted. The first Senate ERISA bill, S.4, did not contain language comparable to § 510 of ERISA which was added by the Senate Committee on Labor and Public Welfare. Yet, no new provisions were added as to a period of limitations. Sections referred to by Senator Hartke as 602, 603 and 610 later became sections 502, 503 and 510:

> Section 610 was added after 602 and 603 were drafted, and (the bill) was not redrafted to cover 610.

Legislative History of ERISA of 1974; Vol. 2, at 1735; 119 Cong. Rec. 30,374 (1973).

III. The Mt. Healthy "Same Decision" Test Of Causation.

The Solicitor General mischaracterizes the third issue. Contrast the issue presented in the petition at i and in the Solicitor General's brief at I.

The Solicitor General's four paragraph discussion at 17 fails to grasp that this Court's test in *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), is a test of causation which goes to liability not simply to the burdens of proof. § 510 proscribes discrimination with the intent to deprive employees of pension benefits. If the acts alleged were caused by a legitimate motive, then there is no liability. The trial judge expressly found such legitimate business motives. (Findings of Fact 107 and 142, Pet. at 86a and 90a). Thus, this is a mixed-motive employment discrimination case similar to *Mt. Healthy* and

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

The Solicitor General erroneously titled the issue "Burdens of Proof" at 17. It is undisputed that the burdens of production and proof as to "same decision" evidence are on the employer.

In the second paragraph, the Solictor General discusses the undisputed purpose of § 510 and the "sole purpose" language from *Gavalik*, pet. at 47, n.39, which conflicts with the trial judge's findings of fact as to petitioners' legitimate business motives.

In the third paragraph, the Solictor General baldly declares as "meritless" petitioners' contention that "same decision" evidence is properly presented in the liability stage of the case.[1] The Solicitor General then discusses the standard burdens of proof in discrimination cases which again are not in dispute.

The Solicitor General asserts that: "Nothing in *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977),. . . , is to the contrary." However, the employers in *Mt. Healthy* and in *Transportation Mgt.* were permitted to defeat liability by presenting "same decision" evidence.

This distinction between defeating liability in the first stage and defeating only damages in the remedial phase is not grasped by the Solicitor General. *See* Br. at 19, n.20. According to the Solicitor General, if the petitioner meets its burden, no monetary liability will ensue. Even this could be untrue if respondents obtained an award of attorneys' fees based on the liability finding. More importantly, it ignores the onus attached to a finding of liability and the effects therefrom. For example, in *McLendon v.*

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[1] This is contrary to *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 404 n.9 (1977).

Continental Group, Inc., 660 F. Supp. 1553 (D. N.J. 1987), petitioners have been collaterally estopped from defending as to liability based on this decision in *Gavalik*.

The Solicitor General also failed to address the standard of appellate review and the policy implications which arise therefrom. As stated in the petition: "The Panel's de novo review of the record and its opinion concerning issues not decided below was violative of the appropriate standards of appellate review." Pet. at 30.

The Third Circuit's opinion mischaracterized the district court's findings of fact. (Pet. 67a). The pension benefits at issue were negotiated by the union and petitioner (FF 78 - 79, pet. 81a) at a time when the can business was in a significant decline. (FF 31, pet. 73a). Senior and older employees were protected from plant shutdowns and involuntary layoffs (FF 14, pet. 70a) by plantwide seniority and the provisions of an interplant job opportunities program. (FF 67, 71 - 76, pet. 79a - 81a).

Petitioners designed the Bell System to manage unfunded pension costs. (FF 53, pet. 77a). Indeed, petitioners set aside hundreds of millions of dollars to meet expected costs, including pensions, due to declining business. 231 million dollars was set aside. (FF 43, pet. 75a). This reserve was spent and an additional 100 million dollar reserved was set aside. (FF 44 - 45, pet 76a). Petitioners' conduct in this regard is an example of corporate responsibility. Conversely, corporate failure to manage unfunded pension costs leads to the bankruptcies filed by other companies in the metals industry which have burdened the Pension Benefit Guaranty Corporation with their pension obligations.

When petitioner "capped" a plant, the purpose of the cap was to identify the proper level of manning needed to meet the projected level of production. (FF 56, pet. 78a). The Third Circuit also mischaracterized findings of fact 61 and 63 (pet. 78a-79a) as showing that the goal of

the company was to adjust production to a predetermined level of manning whereas the trial judge's findings establish that the level of manning was based on the level of production required by market demand. (Pet. at 41a, FF 56, pet. 78a). Laid off employees were subject to recall if "business reasons justified the recall." (FF 56, pet. 78a). The Third Circuit incorrectly states that laid off employees were only to be recalled under "extreme" or "exigent" circumstances. (Pet. 12a, 41a).

The Third Circuit altered the meaning of the trial judge's findings of fact to hold that consideration of pension costs is a *per se* violation of ERISA. For example, it is very significant that in this mixed-motive discrimination case, the Third Circuit never mentioned the trial judge's findings that petitioner had legitimate business motives. (FF 107, 142, pet. 86a, 90a). Such findings were made after an extensive trial and were not clearly erroneous.

The Solicitor General has adopted these mischaracterizations in his brief. For two examples of these mischaracterizations, contrast the findings of the district court with the statements by the Third Circuit and the Solicitor General.

> 1.) The district court's findings of fact 55, pet. 78a; the Third Circuit's Opinion, pet. 12a; and the Solicitor General's brief at 2.
>
> The district court's findings of fact 53, 59 and 68, pet. 77a, 78a, 80a; the Third Circuit's Opinion, pet. 47a, n.39; and the Solicitor General's brief at 18.

The Third Circuit "ignored the findings of fact by the trial judge, (pet. at 25) and held that there is liability "regardless of the existence of other legitimate motives and regardless of the district court's findings of fact that the same results would have occurred in any event." *Id.* at 29.

The Third Circuit decided that consideration of pension costs is a *per se* violation of § 510 if that consideration was "a determinative" factor in the employer's actions. This decision is premised on the type of analysis conducted by the Eighth Circuit in *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985), a race discrimination case. Any consideration of invidious racial discrimination which constitute "a determinative" factor in an employer's personnel actions should be proscribed because an employer has no legitimate interest in considering race. However, the history of American labor legislation such as ERISA represents an accommodation of the legitimate competing interests of employees, unions and management.

Legitimate business prerogatives are at issue here. Petitioners have not violated the Master and Pension Agreements or the National Labor Relations Act. Indeed, the National Labor Relations Act, the Age Discrimination in Employment Act and Title VII protect employers from discrimination claims for actions taken pursuant to the provisions of a bona fide seniority system. 29 U.S.C. § 623(f).

The Solicitor General's flawed assumptions and premises lead to the same erroneous legal conclusions contained in the Third Circuit's opinion. An independent review of the entire record by the Solicitor General including the findings of fact from the district court would have revealed the factual and legal conflicts created by the Third Circuit.

CONCLUSION

This Honorable Court should grant a writ of certiorari to resolve these important and recurring questions, to resolve the conflicts among the circuits, to set a uniform federal statute of limitations for ERISA § 510, and to resolve the conflict between the Third Circuit's "a determinative factor" test (*See* petition at 25, n.16) and this Court's "same decision" test as well as the important policy concerns at stake.

Respectfully submitted,

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